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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T.W., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

TIMOTHY W.,

Defendant and Appellant.

D060810

(Super. Ct. No. J515074B)

APPEAL from an order of the Superior Court of San Diego County, Richard J. Neely, Juvenile Court Referee. Affirmed.

Timothy W. appeals the juvenile court's order on a subsequent petition removing his daughter, T.W., from his custody based on its true finding that there was a substantial risk she would be sexually abused and placing T.W. with her mother, L.T. (Welf. & Inst.

Code, § 342, subd. (c)(1), undesignated statutory references are to this code.) He contends substantial evidence does not support the juvenile court's findings. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, the San Diego County Health and Human Services Agency (the Agency) filed a section 300, subdivision (j), petition on behalf of four-year-old T.W. alleging she was at risk because L.T. physically abused T.W.'s 13-year-old half sibling, O.J. The juvenile court made a true finding on this petition, removed custody from L.T. and placed T.W. with Timothy.

In July 2011, the Agency received a report indicating that O.J. alleged she had been sexually abused by Timothy in the past. O.J. claimed that the sexual abuse began when she was in the sixth or seventh grade and continued until 2010. The Agency filed a subsequent petition under section 342 alleging that T.W. was at risk to be sexually abused. (§ 300, subd. (d).) The court concluded that a prima facie showing had been made on the petition, detained T.W. in out-of-home care and granted the parents supervised visitation.

The jurisdiction and disposition hearing proceeded by way of a trial on the documents. After considering the evidence, the juvenile court found the allegations in the petition true and ordered T.W. removed from Timothy's custody, placed her with L.T. and granted Timothy supervised visitation. (§ 361, subd. (c)(1).) Timothy timely appealed.

DISCUSSION

Timothy asserts substantial evidence does not support O.J.'s allegations because O.J. was not living in L.T.'s home, where the abuse allegedly occurred, during the vast majority of the time O.J. alleges she was being sexually abused there. Even if O.J.'s allegations were true, Timothy claims there is no substantial risk to T.W. because she is his biological daughter and is not approaching the age O.J. was when O.J. claimed the sexual abuse occurred.

We review challenges to the sufficiency of the evidence in support of the juvenile court's jurisdictional and dispositional findings under the substantial evidence standard of review. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. The appellant has the burden to demonstrate there is no evidence of a sufficiently substantial nature to support the findings or orders. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) "If there is any substantial evidence, contradicted or uncontradicted, which will support the judgment, we must affirm." (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113.)

The juvenile court could declare jurisdiction over T.W. if it found, by a preponderance of the evidence, that she had been sexually abused in the past by Timothy or that she was at risk of being sexually abused by him at the time of the jurisdictional hearing. (§ 300, subd. (d).) Because there is no evidence that Timothy ever sexually abused T.W., the court's finding necessarily turned on O.J.'s allegations.

O.J. alleged that Timothy engaged in sexual acts with her when she was about 11 years old until she was about 14. She estimated that the abuse occurred about once a month and generally took place in L.T.'s home, but sometimes at Timothy's home. O.J. claimed that Timothy rubbed his hands on her breasts and vagina, rubbing his penis on her vagina and put his tongue in her vagina. She also watched pornography with him and saw him touch his penis.

Timothy points out that O.J. turned 11 in August 2006 and turned 14 in August 2009; however, from August 2005 through May 2009, O.J. lived with her aunt who had guardianship of O.J. due to a previous dependency case in which L.T. had failed to reunify with O.J. O.J. lived in L.T.'s home from May 2009 until August 2009, but was again removed in August 2009, just before she turned 14. Accordingly, Timothy claims that O.J.'s claims were suspect. We reject this contention.

Although Timothy's recitation of O.J.'s history is correct, there is nothing in the record showing that O.J. was not allowed to visit L.T. while she was under the guardianship of her aunt. A juvenile court must make visitation orders when it chooses guardianship as a child's permanent plan, unless it finds that visitation would be detrimental to the physical or emotional well-being of the child. (§ 366.26, subd. (c)(4)(C); *In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313.) Moreover, guardianship is not the best permanent plan for dependent children for whom reunification efforts have failed, except in circumstances in which statutory exceptions to the requirement that court terminate parental rights of an adoptable child apply. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) Thus, it is highly likely that a statutory exception to

termination of parental rights applied and that the juvenile court could have given O.J. liberal visitation with L.T. Timothy was L.T.'s fiancé and O.J. considered him to be her stepfather; thus it is conceivable that O.J. visited Timothy's home and that Timothy had access to O.J. at L.T.'s home. Additionally, O.J. lived in L.T.'s home for four months in 2009, but was removed in August 2009, just before she turned 14, which is about when O.J. claims the abuse ended.

Timothy next asserts that even assuming the truth of O.J.'s allegations, there is no substantial risk to T.W. because she is his biological daughter and is younger than O.J. was when O.J. claimed the sexual abuse occurred. First, Timothy cited no authority to support his argument that a biological parent is less likely to abuse a biological child. In any event, O.J. has known Timothy since she was a toddler and she considered him to be her stepfather. Thus, Timothy clearly occupied a parenting role to O.J.

While T.W. is younger than O.J., she is not that much younger than O.J. was when O.J. alleged the abuse started. Moreover, Timothy refused voluntary referrals for services, opting to wait until the juvenile court ruled. The court could reasonably conclude that action needed to be taken to keep T.W. safe as Timothy lacked insight regarding appropriate boundaries. Additionally, O.J. alleged that she watched pornography with Timothy and saw him touch his penis. These acts were unrelated to O.J.'s age and masturbation committed in front of a child constitutes sexual abuse. (Pen. Code § 11165.1, subd. (b)(5).)

Finally, O.J. disclosed the abuse to at least three individuals. Her story remained relatively consistent, she did not embellish and admitted when she could not remember

something. Thus, the juvenile court could reasonably conclude O.J.'s allegations were credible and we must defer to the juvenile court on all issues of credibility. (*In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 228.) Accordingly, we discern no grounds in the present record that warrant overturning the juvenile court's decision to remove T.W. based in its conclusion that she was at risk of sexual abuse. (*In re N.M.* (2011) 197 Cal.App.4th 159, 169-170 [a parent need not be dangerous and the child need not have been actually harmed before removal is appropriate as the focus of the statute is on averting harm to the child].)

DISPOSITION

The order is affirmed.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.